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ALEXANDER P. FERSA+

September 8, 2021

VIA ECF

Hon. John M. Vazquez, U.S.D.J.

United States District Court

for the District of New Jersey

Martin Luther King Building & U.S. Courthouse

50 Walnut Street

Newark, NJ 07101

Re: Case No. 20-cv-14243, City of Hoboken v. Exxon Mobil, et al.

Dear Judge Vazquez:

Defendants write to respectfully request that the Court temporarily stay the execution of its order granting Plaintiff's motion to remand (the "Order"), Dkt. 122, to allow Defendants time to file a formal motion to stay remand pending appeal, which Defendants will file within ten days or as soon as the Court requests.¹ Defendants further request that the Court instruct the Court Clerk not to send a certified copy of the Order to the New Jersey Superior Court, in order to preserve the status quo until such time as Defendants' request for a stay pending appeal has been fully resolved. Defendants attempted to confer with Plaintiff, but did not receive a response prior to filing this emergency request.

Approximately one hour ago, the Court granted Plaintiff's motion to remand, holding that the Court does not have jurisdiction over Plaintiff's claims. Dkt. 122. Defendants will be appealing this decision to the Third Circuit, and also intend to file a motion to stay remand pending the appeal. Defendants have a right to appeal the Order because they removed this case under the federal officer removal statute, 28 USC § 1442. While generally "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal," an "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title

¹ This letter is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

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shall be reviewable by appeal or otherwise.” 28 U.S.C. § 1447(d). Defendants also removed this case under the Class Action Fairness Act (“CAFA”), which codifies a statutory right to seek an appeal of the remand order. See 28 U.S.C. § 1453(c). The Supreme Court recently made clear that on appeal a court may review “any issue fairly encompassed within” a remand order of a case removed pursuant to the federal officer removal statute. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1540, 1542 (2021).

A temporary stay is warranted here to preserve Defendants’ appellate rights and spare the parties and the New Jersey Superior Court from what could be a substantial amount of unnecessary and ultimately futile litigation. If the Clerk were to transmit the remand order to the New Jersey Superior Court, “[t]he State court may thereupon proceed with such case.” 28 U.S.C. § 1447(c). As will be explained further in Defendants’ forthcoming motion to stay remand pending appeal, Defendants’ appeal will present serious legal issues, including questions of first impression in the Third Circuit. Indeed, the Third Circuit has not yet considered the propriety of any of the grounds for removal asserted by Defendants in a climate change-related action and will be able to consider all of Defendants’ grounds for removal on appeal. *See Baltimore*, 141 S. Ct. at 1540, 1542.² Absent a stay, Defendants face irreparable harm, whereas a stay would cause Plaintiff no prejudice and, in fact, would serve the public interest and the interests of judicial economy.

Over the past four years, approximately 23 other state and municipal entities have filed similar climate change actions in courts across the country, all of which involve significant national interests. In light of these significant national interests, this Court should allow Defendants time to seek a stay of remand pending appeal to the Third Circuit. *See, e.g., Northrup Grumman Tech. v. DynCorp Int’l, LLC*, No. 1:16-cv-00534-JCC-IDD, 2016 WL 3180775, at *2 (E.D. Va. June 7, 2016) (directing clerk to “refrain from executing the Court’s Order . . . remanding the case back to the Circuit Court” so the parties could brief a stay of the remand order pending appeal), *aff’d*, 865 F.3d 181 (4th Cir. 2017).

Indeed, in prior climate change-related cases, federal courts in California, Hawaii, Rhode Island, Minnesota, Connecticut and Maryland allowed defendants time to brief a motion to stay pending appeal after a grant of remand. *See, e.g., Order Granting Motions to Remand, County of San Mateo v. Chevron Corp. et al.*, No. 17-4929 (N.D. Cal. Mar. 16, 2018), ECF No. 223 at 5–6; Order, *City & County of Honolulu v. Sunoco LP*, No. 20-163 (D. Haw. Feb. 16, 2021), ECF. No. 130; Order, *County of Maui v. Chevron U.S.A. Inc.*, No. 20-470 (D. Haw. Feb. 16, 2021), ECF. No. 101; Opinion and Order, *State of Rhode Island v. Chevron Corp. et al.*, No. 18-395 (D.R.I. July 22, 2019), ECF No. 122 at 16–17; Order, *Minnesota v. Am. Petroleum Inst.*, No. 20-1636 (D. Minn. Apr. 7, 2021), ECF No. 86; Order, *Connecticut v. Exxon Mobil Corp.*, No. 20-1555 (D. Conn. June 11, 2021), ECF No. 56 Memorandum Opinion, *Mayor and City Council of Baltimore v. BP P.L.C. et al.*, No. 18-2357 (D. Md. June 20, 2019), ECF No. 182 at 3.

² Following *Baltimore*, many other appellate courts will also soon address, for the first time, the propriety of several removal grounds asserted in climate change-related actions. *See, e.g., Shell Oil Prods. Co. v. Rhode Island*, No. 20-900, 2021 WL 2044535 (U.S. May 24, 2021); *Chevron Corp. v. County of San Mateo*, No. 20-884, 2021 WL 2044534 (U.S. May 24, 2021); *Suncor Energy, Inc. v. Board of County Commissioners of Boulder County*, No. 20-783, 2021 WL 2044533, at *1 (U.S. May 24, 2021).

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Judge Chhabria of the Northern District of California, for example, stayed execution of his remand order to allow defendants an opportunity to file a motion to stay pending appeal and then, in granting defendants' motion, explained: “[t]he Court finds that the[r]e are controlling questions of law as to which there is substantial ground for difference of opinion and that their resolution by the court of appeals will materially advance the litigation.” Order Granting Motions to Stay, *County of San Mateo v. Chevron Corp. et al.*, No. 17-4929 (N.D. Cal. Apr. 9, 2018), ECF No. 240. Most recently, Chief Judge Tunheim of the District of Minnesota stayed execution of his remand order pending appeal, concluding that “this action raises weighty and significant questions that intersect with rapidly evolving areas of legal thought.” *Minnesota v. American Petroleum Institute*, 2021 WL 3711072, at *2 (D. Minn. Aug. 20, 2021) (emphasis added). More specifically, the court found that “the Second Circuit’s decision in *City of New York* provides a legal justification for addressing climate injuries through the framework of federal common law,” *id.*, and “the *Baltimore* decision increases the likelihood that an appellate court will determine that certain climate change claims arise exclusively under federal law,” *id.* at *3. The Court also noted that this “is not a case of applying thoroughly developed law to well-tread factual patterns; when it comes to questions of the proper forum for adjudicating harms related to climate change, ‘the legal landscape is shifting beneath [our] feet.’” *Id.* at *4. For these and other reasons, the court concluded: “Considerations of judicial economy and conservation of resources also weigh in favor of staying execution of the remand order as the Eighth Circuit determines whether the state or federal court has jurisdiction over this matter.” *Id.* The same is true here—given the shifting “legal landscape,” it makes eminent sense to stay the remand Order until the Third Circuit has the opportunity to weigh in on these important issues. *Id.*

For these reasons, Defendants respectfully ask the Court to temporarily stay execution of the Order and instruct the Court Clerk not to send a certified copy of the Order to the New Jersey Superior Court, pending briefing on Defendants' forthcoming motion to stay, which Defendants will file within ten days or as soon as the Court requests. Attached is a proposed order granting the requested relief.

Thank you for your consideration of this request.

Respectfully submitted,

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